Office-Supreme Court, U.S.
FILED
JUL 14 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-106

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RICHARD K. EHRLICH and LURLINE GARDENS LIMITED DIVIDEND HOUSING PARTNERSHIP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GOLDIN & GORDON
LEON GOLDIN
LAURA GOLDIN
3600 Wilshire Blvd., Suite 2200
Los Angeles, California 90010
(213) 380-1900

SANFORD DEMAIN
14414 Hamlin Street
Van Nuys, California 91401
(213) 902-1661

Attorneys for Petitioners

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RICHARD K. EHRLICH and LURLINE GARDENS LIMITED DIVIDEND HOUSING PARTNERSHIP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GOLDIN & GORDON
LEON GOLDIN
LAURA GOLDIN
3600 Wilshire Blvd., Suite 2200
Los Angeles, California 90010
(213) 380-1900

SANFORD DEMAIN
14414 Hamlin Street
Van Nuys, California 91401
(213) 902-1661

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

A. Whether the False Claims Act, 31 U.S.C. §231, et. seq, mandates the assessment of seventy-six forfeitures against a mortgagor who submitted one certificate containing false data to the Department of Housing and Urban Development ("HUD") which data was used by HUD in creating an amortization schedule for the mortgagee.

1. Whether statements duplicating HUD's amortization schedule filed monthly with HUD by the mortgagee, pursuant to the National Housing Act, 12 U.S.C. §1715, are claims within the meaning of the False Claims Act.

2. Whether, under United States v. Bornstein, if the "vouchers" are false claims, is the mortgagor liable for one forfeiture for each statement filed by the mortgagee.

B. Whether the False Claims Act requires the government to act promptly to seek damages under the Act or may the United States collect damages for the amounts paid after it knew of its claim.

C. Whether, F.R.Civ.P., Rule 56 permits granting

of summary judgment when there are disputed material factual issues and the facts are complex, confusing and inconclusive.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	1
TABLE OF CONTENTS	3
TABLE OF AUTHORITIES	4
OPINION BELOW	6
JURISDICTIONAL STATEMENT	6
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	6
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	13
CONCLUSION	25
APPENDIX "A" - Opinion of the Ninth Circuit Court of Appeals	
APPENDIX "B" - Findings of Fact and Conclusions of Law of the United States District for the Central District of California	
APPENDIX "C" - Constitutional Provisions and Rules Involved	

TABLE OF AUTHORITIES

Cases	Page
Cox v. American Fidelity and Gas Company 249 F.2d 207 (9th Cir., 1957)	23
Eby v. Reb Realty, Inc. 495 F.2d 646 (9th Cir., 1974)	24
Kennedy v. Silas Mason Company 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948)	24
Miller v. United States 550 F.2d 17 (Ct.Cl., 1977)	24
Radobenko v. Automated Equip. Corp. 520 F.2d 540 (9th Cir., 1979)	23
United States ex rel. Marcus v. Hess 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943)	17
United States v. Bornstein 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed. 2d 514 (1976)	13, 14, 17, 18, 19
United States v. Cohn 270 U.S. 339, 46 S.Ct. 251, 70 L.Ed. 616 (1926)	15
United States v. McNinch 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958)	15
United States v. Mead 426 F.2d 118 (9th Cir., 1970)	24

United States v. National Wholesalers 236 F.2d 944 (9th Cir., 1956) 17

United States v. Neidorf 522 F.2d 916 (9th Cir., 1975) 21

United States v. Woodbury 359 F.2d 370 (9th Cir., 1966) 17, 20

Statutes

Federal Rules of Civil Procedure, Rule 56 6, 22, 23, 25

12 U.S.C. §1715 6, 7, 13

12 U.S.C. §1715z-1 6, 7

18 U.S.C. §1001 9

28 U.S.C. §1254(1) 6

31 U.S.C. §231 6, 13, 20

31 U.S.C. §233 6, 20

Revised Statutes §3490 6, 20

Revised Statutes §5438 6, 17, 20

Regulations

24 C.F.R. §236.510 6, 15

24 C.F.R. §236.510(b)(2) 6, 16

OPINION BELOW

The opinion below is published at 643 F.2d 634. A copy of the opinion is attached to this petition as Appendix "A". Written Findings of Fact and Conclusions of Law were filed by the United States District Court for the Central District of California. No opinion of the United States District Court for the Central District of California was published. A copy of the Findings of Fact and Conclusions of Law is attached as Appendix "B".

JURISDICTIONAL STATEMENT

The judgment and order of the United States Court of Appeals for the Ninth Circuit is dated and was filed on April 23, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The relevant statutes and rules, 31 U.S.C. §231 (Revised Statutes §§3490 and 5480), 31 U.S.C. §233, 12 U.S.C. §§1715l, 1715r, 1715z-1, Federal Rules of Civil Procedure, Rule 56, and 24 C.F.R. §§236.510(a)(2) and (b)(2), are set forth in Appendix "C".

STATEMENT OF THE CASE

Pursuant to §236 of the National Housing Act, 12 U.S.C. §1715z-1, petitioner, Lurline Gardens Limited Housing Partnership ("Partnership") sponsored the construction and operation of a low income multi-unit housing development, Lurline Gardens Housing Project ("Project"). Section 1715 authorizes the Department of Housing and Urban Development ("HUD") to insure a mortgage for such a development and to subsidize a sponsor's mortgage interest cost by making interest reduction payments to the mortgagee of a qualified mortgagor.

In June, 1971, an application for an insured loan on the project, including insured advances during construction, was made on behalf of the Partnership through its sole general partner, petitioner, Richard K. Ehrlich ("Ehrlich") to HUD and the Weyerhauser Mortgage Company ("Weyerhauser"). A mortgage loan, in a maximum amount of $3,235,000.00, including advances, was approved by HUD and an agreement was executed by HUD, Weyerhauser and the Partnership in August, 1971. The $3,235,000.00 mortgage loan amount represented 90

percent of the estimated replacement cost of the project. The agreement provided that the maximum mortgage would become subject to a reduction if, based upon the actual cost of the completed project, the authorized mortgage amount exceeded the amount permitted by the National Housing Act and the Regulations promulgated thereunder.

On about August 10, 1972, Ehrlich delivered to HUD a certificate of actual cost, indicating that the completed cost of the project, exclusive of land, was $3,096,553.45. Based on that sum, HUD confirmed the maximum mortgage loan at the original, $3,235,000.00 figure. In accordance with the provisions of §236, in July, 1972, HUD had commenced interest reduction payments to the mortgagee of the project, Weyerhauser. In February 1973, Weyerhauser assigned the mortgage to the Federal National Mortgage Association ("FNMA").

The original certificate of actual cost contained amounts shown as outstanding debts to various subcontractors. On about May 24, 1973, Ehrlich submitted a supplemental cost certificate to HUD, setting forth those amounts which had actually been paid to the

various subcontractors in final payment of the outstanding debts. According to respondent, United States of America ("U.S.A."), the certificates showed as costs paid or to be paid to subcontractors, inflated sums of money. Furthermore, in respondent's view, in the certificates, Ehrlich and the Partnership knowingly failed to disclose that Ehrlich had an identity of interest with one of the subcontractors, Topaz Supply Corporation ("Topaz").

Based on the statements made by way of the certificates, Ehrlich was indicted for submitting false claims to a government agency in violation of 18 U.S.C §1001. On July 14, 1975, he pleaded guilty to two counts of the indictment.

On May 12, 1978, respondent filed this civil action. Count I of the complaint sought specific performance of an agreement by which the petitioners had agreed with the mortgagee to reduce the mortgage on the project by any amounts which exceeded those allowed by the National Housing Act. Count II sought double damages and forfeitures under the False Claims Act, 31 U.S.C. §§231-235. Both counts alleged that petitioner Ehrlich had inflated the costs of the project, caused HUD to

insure a mortgage in a greater amount than it would otherwise have done, and caused HUD to make greater interest reduction payments than it would otherwise have been required to make. Specific performance was sought to compel petitioners to pay back to FNMA the alleged excess over the allowable mortgage. Additionally, under the False Claims Act, the complaint sought damages in double the amount of the difference between the supposedly correct and the purportedly excessive interest reduction payments made by HUD to FNMA, as well as a $2,000.00 forfeiture for each monthly statement (the allegedly false "claim") filed by FNMA with HUD.

On respondent's motion for summary judgment, petitioners disputed HUD's allegation that petitioners had made seventy-six false claims. Petitioners contended that FNMA's statements were not false claims and that petitioners were not liable for any forfeitures based on FNMA's submitting the statements. HUD alleged that each of FNMA's seventy-six statements was a false claim for which petitioners were liable. The monthly statements which were presented to HUD by FNMA

merely incorporate HUD's calculations of the monthly interest payments due on petitioner's and hundreds of other mortgages. The certificates were provided to HUD by FNMA to verify that the listed mortgages were not in default.

Additionally, petitioners disputed HUD's calculations of the maximum insurable mortgage. The basis for petitioners' contention was, among other things:

1. HUD's calculations included construction costs, sponsor's allowance, land value and "other costs." Nowhere were the "other costs" explained or defined. Petitioners could not refute these costs and contended that the court could not determine their accuracy.

2. HUD's disallowance of Topaz's mark-up. Topaz was utilized by the partnership as a general purchasing agent for the Project. Topaz was a California corporation, owned by Ehrlich. It dealt with various projects, including the one here in question. Although Topaz was one of the suppliers on the Project, and Ehrlich had an identity of interest in Topaz, the certificate of actual costs did not list Topaz as an entity with which either the Partnership or Ehrlich had an

identity of interest. Respondent claimed this omission was intentional and fraudulent; warranted disallowing Topaz's profit allowance as an actual cost; and was part of the false claim for interest reduction payments. Petitioners denied both the facts and theory of these allegations.

Respondent's motion for summary judgment on both counts was successful. Judgment was entered, as to Count I, for specific performance of the contract, requiring Ehrlich and the Partnership to pay to FNMA $227,700.00 to reduce the outstanding mortgage. As to Count II, Ehrlich and the Partnership were ordered to pay to HUD $140,137.44, an amount double the amount of damages plaintiff allegedly incurred as a result of excess interest reduction payments. Additionally petitioners were ordered to pay damages in the amount of $152,000.00, representing seventy-six $2,000.00 forfeitures for each of the statements sent to the government by FNMA.

On appeal to the United States Court of Appeal for the Ninth Circuit, in a 2-1 decision, the District Court's judgment was affirmed. Judge Canby, concurring and

dissenting, said that the court's finding of seventy-six false claims was erroneous, that petitioners had, at most, committed two acts which amounted to false claims and, consistent with United States v. Bornstein, petitioners were only liable for their own acts, not the statements of others.

REASONS FOR GRANTING THE WRIT

A

This case raises significant questions regarding interpretation of the False Claims Act, 31 U.S.C. §231, et. seq. and its application to a situation where, pursuant to §236 of the National Housing Act, 12 U.S.C. §1715, a mortgagor receives, from HUD, approval and insurance of a maximum loan amount and, HUD agrees to make interest reduction payments to the mortgagee. To induce HUD's actions, the mortgagor prepares a certificate containing inflated costs. Based upon that certificate, HUD prepares a schedule of interest reduction payments and gives it to the mortgagee. The mortgagee monthly submits a statement certifying that the mortgage is not in default and repeating HUD's interest

reduction calculations.* The questions presented include a request that this Court determine whether such statements are claims for payment within the meaning of the False Claims Act and, if they are, whether, consistent with United States v. Bornstein, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976), the mortgagor is liable for forfeitures for each of the statements submitted by the mortgagee.

1. Petitioners argue that the statements are not false claims within the meaning of the False Claims Act. The statements were merely certificates from FNMA to HUD stating that a group of mortgagors were current in their obligations. On each statement FNMA asked for a total payment and listed, at least with reference to petitioners, a duplication of an amortization schedule prepared by HUD at the time HUD agreed to make payments. Each statement was merely a means of keeping accounts in order and reflected amounts then

*In petitioners case, for convenience, both on motion for summary judgment and in the Ninth Circuit, these statements were denominated "vouchers." Here, they will be referred to as "statements."

due from HUD to FNMA, based on HUD's own calculations.

This Court has never answered the question whether such statements are claims within the meaning of the False Claims Act. In United States v. Cohn, 270 U.S. 339, 46 S.Ct. 251, 70 L.Ed. 616 (1926), in a different context, a claim was defined as " 'a demand of some matter as of right made by one person upon another . . .' " (270 U.S. at 345). Cohn held that, under the False Claims Act a claim against the government is a claim for money or property against the government.

In United States v. McNinch, 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958) this Court made it clear that the "False Claims Act was not designed to reach every kind of fraud practiced on the Government" (356 U.S. at 599) and found the Cohn definition of a claim still relevant.

Petitioners' position is that the statements submitted by the mortgagee were not claims as defined by this Court in Cohn and McNinch. Pursuant to 24 CFR §236.510, interest reduction payments commence on the date on which the Commissioner endorses the note for

insurance and terminate upon "the Commissioner's receipt of the mortgagee's notice of intention to file an insurance claim and to acquire and convey title . . . ." 24 CFR §236.510(b)(2). Thus, here, payments were due from HUD to FNMA as long as FNMA did not say the project was in default. The statements in this case were merely certificates from FNMA certifying that petitioners' project, along with hundreds of other projects, was not in default. The statements were not claims for payment. They did not demand payment from the government. They did not constitute a claim for money against the U.S.A. The statements represented FNMA's ministerial act of verifying HUD's amortization schedule.

Surely, Congress did not intend the False Claims Act to reach clerical acts or acts which do not make the government liable for payment of monies or property. Yet, that is precisely the reach of the Act under the Ninth Circuit's interpretation in this case.

2. If the statements are false claims, petitioners assert that they are not liable for forfeitures based on the number of statements presented to HUD by FNMA.

The Ninth Circuit held that each submission of a statement by FNMA to HUD was a false claim attributable to petitioners. Such a holding appears to be contrary to the intent of the False Claims Act to penalize a person only for his own false acts and not the acts of others.

Petitioners recognize that in the case of claims for payments submitted directly by a wrongdoer to the government, each claim incorporating false data is a separate claim within the meaning of Rev. Stat. §5438. See, e.g., United States v. Woodbury, 359 F.2d 370 (9th Cir., 1966); United States v. National Wholesalers, 236 F.2d 944 (9th Cir., 1956). Cf. United States ex. rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943). However, in a situation where the wrongdoer only does the fraudulent act which sets in motion an innocent person's submission of claims incorporating the false information, this Court has interpreted the statute as requiring the trial court to look only to the acts of the wrongdoer, not to those of the innocent party. United States v. Bornstein, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976).

Bornstein, a False Claims case, held that the fraudulent acts committed by the offending party are the determining factors in calculating the number of forfeitures. "A correct application of the statutory language requires . . . that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." (423 U.S. at 313).

Applying the Court's Bornstein reasoning to the facts of this case renders a completely different outcome than the Ninth Circuit's result. Here, petitioners prepared one certificate which contained false data. Relying on that data, HUD prepared for FNMA an amortization schedule. FNMA resubmitted that amortization schedule to HUD with the monthly statements certifying the mortgages as not in default. Petitioners had nothing to do with the monthly statements. They did not prepare them. They did not submit them. They do not receive payments from them. The statements were between HUD and FNMA.

Contrary to Bornstein, the Ninth Circuit's decision says that petitioners are to be held accountable for each

of FNMA's acts. The decision totally disregards petitioners' acts. It does not follow the express instruction of Bornstein to focus upon "the specific conduct" of the person being penalized. The opinion below focuses on FNMA's conduct and penalizes petitioners for that conduct.

The lesson of Bornstein is that a person may be penalized only for his own conduct. Here, petitioners prepared one certificate which contained false data. Therefore, petitioners should have been charged with only one forfeiture.

B

Petitioners contend that the False Claims Act requires the U.S.A. to act with due diligence and not to delay seeking damages under the Act once a false claim or claims are discovered. Petitioners contend further that damages sustained by reason of the government's failure to act are not damages within the meaning of the Act and a false claimant cannot be held responsible for such damages.

This Court has not addressed the question of damages assessable under the False Claims Act when the

government has made excessive payments with full knowledge that overpayments were being made. The question is squarely presented here.

The False Claims Act defines damages as that damage which the government sustains by reason of the false claimant's conduct. Rev. Stat. §3490. See, United States v. Woodbury, 359 F.2d 370, 379 (9th Cir. 1966). Double damages and a $2,000 forfeiture may be imposed for doing an act prohibited by Rev. Stat §5438.

The critical language is "by reason of." Although that language is not defined, Congress did not intend to allow a governmental agency to sit idly by, knowing a fraud was being committed, and do nothing by it. 31 U.S.C. §233 requires the United States to be diligent in its prosecutions, pursuant to 31 U.S.C. §231.

Here, the government knew it was overpaying at least as early as July, 1975, when petitioner, Ehrlich, pleaded guilty to two counts of a related criminal indictment. Respondent had begun an investigation into possible fraud in connection with the project as early as December, 1972. Ehrlich's guilty plea conclusively established that the government had some cause of

action under the False Claims Act. Yet, from July, 1975, until May, 1978, the government continued making monthly interest reduction payments and did nothing to reduce its damages.

It is submitted that the government's inexcusable delay in moving to protect itself from the continued disbursement of excess interest reduction monies rendered its payments "voluntary" and not damages sustained "by reason of" petitioners' act. As of July, 1975, respondent knew conclusively that it was being "damaged" by improper excess interest payments and, if successful in its civil action, it would be entitled to double the excess, as damages. Rather than take action, the government allowed the excess payments to continue unabated, and did absolutely nothing to mitigate its damages.

As Judge Chambers suggested (in another context) in his concurring and dissenting opinion in United States v. Neidorf, 522 F.2d 916, 921 (9th Cir., 1975), to define the U.S.A.'s continued payments after the time it had knowledge as "voluntary" "would achieve a closer approximation of the Congressional intent. It would inspire

the Government to move a little faster in the future than it did in this case."

That reasoning should be adopted by this Court. It contravenes the intent of Congress to permit the government to collect double damages for overpayments knowingly made by HUD.

C

The decision below allows the granting of a motion for summary judgment (F.R.Civ.P., Rule 56) despite the existence of complicated, confusing and unsettled factual questions as well as an unresolved duspute on the question of fraudulent intent.

Petitioners contend that three substantial factual issues should not have been determined by summary judgment:

1. The question of petitioner Ehrlich's fraudulent intent in failing to disclose his relationship with Topaz, a California corporation owned by Ehrlich. Petitioners denied any fraudulent intent and presented affidavit's disputing the government's position.

2. The question of the amount of the inflated costs.

Respondent used complex calculations in figuring the actual costs of construction. Petitioners opposed these calculations, pointing out that the formulas used were unexplained. This material omission of fact left a substantial gap in the determination of a critical issue.

3. The question of petitioners' entitlement to certain credits before damages could properly be assessed. Respondents provided no information indicating whether, or to what extent, the credits had been applied.

It is the well-settled rule that a summary proceeding may not be substituted for a trial. The full question before the court on a motion for summary judgment is the existence of a material issue of fact, not its resolution. On motion for summary judgment, "the trial judge must determine if there are any material factual issues which must be resolved before the trier of fact. It is not the trial judge's function, under Rule 56, to resolve those issues or weigh the evidence." Cox v. American Fidelity and Gas Company, 249 F.2d 207, 210 (9th Cir., 1957). See also, Radobencko v. Automated Equip. Corp., 520 F.2d 540 (9th Cir., 1979). Summary judgment is only

proper when there are no disputed factual issues and only questions of law remain to be decided. In some instances, summary judgment may be improper because "the legal issue is so complex, difficult, or insufficiently highlighted that further factual elucidation is essential for its prudently considered resolution." Eby v. Reb Realty, Inc., 495 F.2d 646, 649 (9th Cir., 1974). See also, Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948).

The question presented to this Court is whether summary judgment was proper here, in light of the complex issues raised and the unresolved factual issue of petitioner's alleged fraudulent intent. It was not for the District Court to make a factual determination on the issue of credits. Nor should the court have assessed damages based on respondent's calculations. The issue was too complex and required further elucidation. Eby v. Reb, supra. And, a trial on the contested issue of fraudulent intent was the proper resolution of that question. United States v. Mead, 426 F.2d 118 (9th Cir., 1970). See also, Miller v. United States, 550 F.2d 17 (Ct.Cl., 1977).

The summary disposition of this matter was contrary to the purpose of F.R.Civ.P., Rule 56, which is to resolve matters where no factual disputes remain. The disposition denied petitioners their right to a trial on the disputed questions and prohibited them from responding to the government's allegations.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GOLDIN and GORDON
LEON GOLDIN
LAURA GOLDIN
SANFORD R. DEMAIN

LEON GOLDIN
Attorneys for Petitioners

Filed in the Court of Appeals,
Ninth Circuit
April 23, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	**No. 79-3304**
	)	
Plaintiff-Appellee,	)	**OPINION**
	)	
v.	)	
	)	
RICHARD K. EHRLICH and LURLINE GARDENS LIMITED DIVIDEND HOUSING PARTNERSHIP,	)	
	)	
Defendants-Appellants.	)	
	)	

Appeal from the United States District Court for the Central District of California

Before: WRIGHT and CANBY, Circuit Judges, and MURPHY, Senior District Judge.*

EUGENE A. WRIGHT, Circuit Judge:

I. FACTS

Section 236 of the National Housing Act, 12 U.S.C. §1715z-1 (1976), authorizes the Secretary of Housing and

*Of the Southern District of New York.

Urban Development to insure mortgages and subsidize interest payments on behalf of the sponsors of low income housing projects. This case involves a project sponsored by Lurline Gardens, a limited partnership. Richard Ehrlich was Lurline's sole general partner, and was the general contractor for the project.

An insurable mortgage is limited, in a case such as this, to 90% of the replacement costs of the project. Replacement costs include construction costs.

The interest subsidy reduces the sponsor's interest payments to one percent of the amount of the mortgage and the larger the mortgage, the larger the subsidy.

HUD initially estimates the construction and other costs of a project to determine the maximum insurable mortgage. Upon completion of the project, the sponsor must submit a statement of actual costs to HUD. If the costs are less than estimated, the insurable mortgage is reduced, and the sponsor must repay a portion of the principal to the mortgagee.

Interest subsidies are paid directly to the mortgagee who submits a monthly voucher to HUD. It lists all mortgages held by him for which HUD has agreed to

provide interest subsidies, and certifies that none is in default.

HUD, Lurline Gardens, and a mortgagee entered into an "Agreement and Certification" in August, 1971. Ehrlich signed the agreement on behalf of the partnership. HUD agreed to insure the mortgage and provide interest subsidies. The partnership

> agree[d] that if it receives from the Mortgagee monies in excess of that permitted under the National Housing Act and the Regulations promulgated pursuant thereto, it will pay upon demand forthwith to the Mortgagee any such excess for application to the reduction of the then outstanding principal balance of the mortgage.

The Agreement recites that, other than Ehrlich's role as general contractor, there was no identity of interest between the partnership, the general contractor, and the subcontractors. The partnership agreed to notify HUD of any identity of interest that was created. In that event, the Agreement provided:

> For purposes of determining actual cost no profit or general overhead may be included in the subcontract unless [HUD] has in advance granted approval in writing of the subcontract and has approved a specific dollar amount or a specific percentage for profit and/or general overhead.

In August, 1972, the partnership submitted a Mortgagor's Certificate of Actual Cost, and a Contractor's Certificate of Actual Cost, both prepared by Ehrlich. The certificates overstated construction costs so that the partnership would not have to repay a portion of the principal. HUD was then insuring a larger mortgage and providing larger interest subsidies than were authorized under the Act.

Ehrlich also certified falsely that there was no identity of interest with any subcontractor on the project. He was the sole owner of one subcontractor, Topaz Supply Corporation.

In 1975, Ehrlich pleaded guilty to two counts of an indictment, based on these events, charging him with submitting false statements to a government agency. He admitted knowingly and intentionally inflating the costs of construction.

In April, 1978, HUD demanded that the partnership pay the excess principal to the mortgagee pursuant to the Agreement. The partnership did not comply.

HUD then initiated this action and obtained a summary judgment. The district court ordered specific

performance of the Agreement, directed the partnership to reduce the principal on the mortgage, and assessed 76 forfeitures and double damages under the False Claims Act, Rev.Stat. §§ 3490, 3494 & 5438.

We affirm.

II. SPECIFIC PERFORMANCE

The district court directed the partnership to reduce the principal by $227,700. Ehrlich argues that summary judgment was inappropriate because there is a dispute as to the actual cost of the project, which is used to calculate the amount of the reduction. He also argues that HUD lacks standing and its action is barred by a statute of limitations.

The district court relied on an affidavit by William Willits, a HUD official, which set forth in detail HUD's calculation of the actual cost of the project.

In his brief, Ehrlich objects to two aspects of this calculation. First, no markup was allowed on materials purchased from Topaz Supply Corporation. At oral agrument, however, his counsel conceded that Ehrlich's failure to disclose his identity of interest and obtain advance approval of the markup permitted HUD, under

the express terms of the Agreement, to exclude it from actual costs.

Second, Ehrlich claims that a group of items identified as "Other Costs" is understated. He submitted an affidavit alleging that when the mortgage was first issued, "Other Costs" were $70,000 more than the figure Willits used. He did not specify any items that were omitted or understated, but simply alleged he did not understand the calculation.

This does not defeat a motion for summary judgment. An exhibit to Willits' affidavit set forth the specific items included in "Other Costs." Ehrlich did not seek a continuance or use discovery procedures for additional information regarding the calculation. "Conclusory allegations, unsupported by factual data, do not create a triable issue of fact." California ex rel. Department of Transportation v. United States ex rel. Department of Transportation, Federal Highway Administration, 561 F.2d 731, 733 n.4 (9th Cir. 1977) (citations omitted).

We see no merit to the argument that HUD lacked standing to enforce the partnership's obligation to reduce

the principal. HUD was a party to the Agreement, and the provision requiring reduction of the mortgage was for its benefit.

Nor is there merit to the argument that relief was barred by the statute of limitations. Ehrlich claims 28 U.S.C. §2415(b) (1976) is applicable. It imposes a three-year limit on tort actions. Here, the substance of the claim sounds in contract, and if any limitations period applies,[1/] it is six-years. 28 U.S.C. §2415(a) (1976). See United States v. Limbs, 524 F.2d 799, 801 (9th Cir. 1975). The action was timely brought.

III. FALSE CLAIMS ACT

A person who "present[s] or cause[s] to be presented" a claim against the United States, "knowing such claim to be false, fictitious, or fraudulent," is subject to civil liability under the False Claims Act. Rev.Stat. §§ 3490, 3494 & 5438. See United States v. Bornstein, 423 U.S. 303, 305 n.1, 96 S.Ct. 523, 526 n.1, 46 L.Ed.2d 514

[1/] 28 U.S.C. §2415(a) (1976) applies to an action by the United States for money damages. Because the action was filed within the six-year period, we need not decide whether the statute applies to an action for specific performance.

(1976). The district court held that Ehrlich caused false claims to be presented.

The monthly vouchers of the mortgagee were false claims within the meaning of the Act. The concept of a claim against the government includes a demand for money. Id. at 309 n.4, 96 S.Ct. at 528 n.4. Due to Ehrlich's false certifications, the interest subsidies demanded and paid each month were falsely inflated. Individual demands for payment pursuant to one overall contract constitute individual false claims. United States v. Woodbury, 359 F.2d 370, 377-78 (9th Cir. 1966); United States v. Collyer Insulated Wire Co., 94 F.Supp. 493, 496 (D.R.I. 1950).

Two civil penalties may be assessed under the Act. Any person who "shall do or commit any of the acts prohibited. . . shall forfeit and pay to the United States the sum of two thousand dollars . . ." Rev.Stat. §3490. In addition, the person is liable for double the damages sustained by the United States "by reason of" such acts. Id.

A. Forfeitures

The district court assessed 76 forfeitures, one for

each monthly voucher. Ehrlich argues the number of forfeitures should be limited to the number of acts he committed which caused false claims to be filed. Asserting that he did but one act, inflating construction costs, that caused false claims to be filed, he concludes that he is liable only for one forfeiture.

HUD argues the number of false claims was the proper measure of the number of forfeitures. It emphasizes that Ehrlich knew false claims would be filed each month, and that he could have prevented additional false claims from being filed by reducing the principal on the mortgage. By not doing so, he reaped a continuing benefit at the government's expense.

In Bornstein, the Court considered a similar question. A subcontractor sent, in three separately invoiced shipments, falsely labelled components to a prime contractor. The prime contractor shipped the final product to the government in 35 separately invoiced shipments. Each invoice was a false claim within the meaning of the Act.

The Court held that the subcontractor was liable for three forfeitures. "A correct application of the statu-

tory language requires . . . that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." 423 U.S. at 313, 96 S.Ct. at 529. Had the subcontractor committed one act which caused false claims to be filed, it would have been liable only for one forfeiture, regardless of the number of claims filed. Id. at 312, 96 S.Ct. at 529.

The Court noted, however, that the number of false claims submitted by the prime contractor was unrelated to the subcontractor's conduct. "The fact that [the prime contractor] chose to submit 35 false claims instead of some other number was, so far as [the subcontractor] was concerned, wholly irrelevant—completely fortuitous and beyone [its] knowledge or control." Id. at 312, 96 S.Ct. at 529.

This strongly suggests that, if a person knowingly causes a specific number of false claims to be filed, he is liable for an equal number of forfeitures. In the absence of such knowledge, using the number of claims to determine the number of forfeitures would be arbitrary. Where such knowledge is present, however, it is consis-

tent with the purposes of the Act to impose forfeitures based on the number of claims.

The Act's sponsor said it was aimed at "bands of conspirators" who were defrauding the government. Cong.Globe, 37th Cong., 3d Sess., 995 (remarks of Sen. Howard). It would defeat the purposes of the Act to impose multiple forfeitures on a person submitting false claims, but limit the liability of coconspirators who caused the claims to be submitted.

This case is analogous. Ehrlich knew a false claim would be submitted each month. He could have prevented the filing of additional false claims. Instead, he did nothing and gained a continuing benefit from the inflated interest subsidies. Had he submitted the claims himself, he would be liabile for 76 forfeitures. As in the case of conspirators, it would defeat the purposes of the Act, given Ehrlich's knowledge and control of the situation, to limit his liability to one forfeiture.

The district court correctly held him liable for 76 forfeitures.

B. Double Damages

Ehrlich argues that the district court erred in grant-

ing summary judgment of double damages under the False Claims Act. The damage award is based on the excess interest subsidies paid by HUD.

The excess payments resulted from the falsification of construction costs. The damage calculation begins, therefore, with a determination of the amount by which Ehrlich falsely overstated those costs. Ehrlich argues that it is improper to include the "Topaz markup" in the amount of the overstatement, since he lacked fraudulent intent when he included it in the statement of actual costs.

The government's burden was to prove that Ehrlich caused false claims to be filed with knowledge that the claims were false. United States v. Mead, 426 F.2d 118, 123 (9th Cir. 1970). It had to show that Ehrlich knew the Topaz markup could not be included in actual costs.

On three occasions Ehrlich disclaimed in writing any identity of interest between the prime and subcontractor. He has admitted he knew these disclaimers were false. He cannot now deny such knowledge. F.R.Civ.P. 36(b).

The Agreement expressly excludes profit or general

overhead from actual cost where there is an identity of interest, absent prior approval by HUD. Ehrlich signed the Agreement and is fairly charged with knowledge of its provisions. Coupled with his admission that he was aware of the identity of interest, this is sufficient to establish that he knew the markup could not be included in actual costs.

Ehrlich's affidavit stated he did not refuse to declare his interest in Topaz. He did not allege that he was unaware of this provision, however, or that he was unaware of the identity of interest. His affidavit does not establish a material dispute regarding his knowledge that the markup could not be included in actual costs.

Ehrlich also argues that "early on" HUD was aware that the cost figures had been falsely inflated. He claims that from that time forward no damages were sustained "by reason of" his acts.

HUD demanded that the partnership reduce the principal in 1978. It refused. Had HUD acted unilaterally and terminated the excess interest subsidies, it would have risked contractual liability to the mortgagee, and the possibility of a default on the mortgage. In that

event, as an insurer, it would have been liable for the outstanding balance.

Under the circumatances, we cannot conclude that HUD's knowledge that Ehrlich had overstated costs broke the chain of causation. It continued to incur losses "by reason of" Ehrlich's fraudulent acts.[2/]

Finally, Ehrlich argues that he paid HUD excess rental charges, and that some of these payments were used by HUD for its interest subsidy payments. He would have the damages suffered by reason of the excess interest subsidies reduced by the amount of these excess rental payments.

Ehrlich was required by statute to make these payments. 12 U.S.C. §1715z-1(g) (1976). Compliance with a statutory duty is no basis to reduce the damages.

AFFIRMED

CANBY, Circuit Judge, concurring in part and dis-

[2/] Cf. United States v. Hibbs, 568 F.2d 347 (3d Cir. 1977) (defendant not liable under False Claims Act because loss attributable to the wrong doing of a third party); United States v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966) (defendant not liable because government invited claim as a means of adjudicating its merits).

senting in part.

I concur in all of the opinion of Judge Wright except part III, subdivision A. With that portion of the opinion, which affirms the imposition of 76 forfeitures, I respectfully dissent. My reading of United States v. Bornstein, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976), compels me to conclude that appellant is liable for no more than two forfeitures under Rev.Stat. §§ 5438 and 3490.

It is true, as the majority opinion points out, that in Bornstein the subcontractor that caused the prime contractor to submit 35 false claims had no knowledge or control over the number of separate claims the prime contractor chose to submit. In my view, however, this point is not the essential part of Bornstein. The central point is found in Bornstein's rejection of the Government's argument that the subcontractor should be held liable for 35 forfeitures:

> The difficulty with this position is that it fails to distinguish between the acts committed by Model [the subcontractor] and the acts committed by United [the prime contractor]. The distinction is a critical one, because the statute imposes liability only for the commission of acts which cause false claims to be

presented.

423 U.S. at 312, 96 S.Ct. at 529 (emphasis supplied). The Supreme Court's position is made even more clear by the language immediately following:

> If United had committed one act which caused Model to file a false claim, it would clearly be liable for a single forfeiture. If, as a result of the same act by United, Model had filed three false claims, United would still have committed only one act that caused the filing of false claims and thus, under the language of the statute, would again be liable for only one forfeiture. If, on the other hand, United had committed three separate such causative acts, United would be liable for three forfeitures, even if Model had filed only one false claim. The Act, in short, penalizes a person for his own acts, not for the acts of someone else.

Id. (Emphasis supplied).

In my view, the majority here deviates from the teaching of Bornstein by subjecting the appellant to forfeitures based not upon his own causative acts, but upon the 76 submissions by the mortgagees. Indeed, the majority's analogy to the law of conspiracy indicates that appellant is being charged with responsibility for the mortgagee's filings. This is what the quoted language of Bornstein instructs us not to do.

It appears from the findings and conclusions of the

district court that appellant submitted two documents that falsely inflated the cost of construction: the Mortgagor's Certificate of Cost prepared by appellant on behalf of his partnership, and the Contractor's Certificate of Cost prepared by him as general contractor. I would accordingly hold appellant liable for two forfeitures.

Filed January 16, 1979
Entered January 18, 1979

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. RICHARD K. EHRLICH and LURLINE GARDENS LIMITED DIVIDEND HOUSING PARTNERSHIP, Defendants.	No. CV 78-1836-R FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the motion of plaintiff, United States of America, for a summary judgment in accordance with Fed. R. Civ. P. 56, this Court makes the following:

FINDINGS OF FACT

1. This cause of action is brought pursuant to the common law remedy of specific performance and the statutory remedy under the False Claims Act, 31 U.S.C. §§231-235.

2. This Court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. §1345 and 31

U.S.C. §232 and over the parties.

3. Lurline Gardens Limited Dividend Housing Partnership, hereafter the Partnership, is a limited partnership, with Richard K. Ehrlich as its sole general partner. The Partnership is the sponsor of Lurline Gardens, a multi-family housing project the mortgage of which is insured under Section 236 of the National Housing Act, 12 U.S.C. §1715z-1, by the Department of Housing and Urban Development (HUD), an agency and instrumentality of plaintiff, United States.

4. Defendant Ehrlich was the general contractor for the construction of Lurline Gardens.

5. On July 22, 1971, HUD issued a Firm Commitment to the Partnership to insure the Lurline Gardens mortgage in the amount of $3,235,000, which amount was subject only to reduction pursuant to the terms of the Firm Commitment.

6. On August 1, 1971, the Partnership, Weyerhauser Mortgage Company, and HUD entered into a contract entitled "Agreement and Certification" in which for good and valuable consideration the partnership agreed to pay upon demand to the mortgagee of Lurline Gardens any

monies the Partnership received in excess of that permitted by the National Housing Act.

7. The National Housing Act requires that the mortgagor of a Section 236 project pay to the mortgagee that amount of the proceeds of the mortgage that the mortgagor received in excess of the approved percentage of the actual cost.

8. The approved percentage of the actual cost for the Lurline Gardens project was 90%.

9. On August 10, 1972 the Partnerhsip submitted to HUD FHA Form 2330, Mortgagor's Certificate of Cost prepared by Ehrlich on behalf of the Partnership, and FHA Form 2330-A, Contractor's Certificate of Actual Cost prepared by Ehrlich as general contractor, to induce HUD to endorse the Lurline Gardens mortgage for insurance.

10. Ehrlich knowingly and intentionally inflated and misrepresented the costs of construction on the Contractor's Certificate of Cost by $201,405.79.

11. The Partnership received $3,235,000 from Weyerhauser Mortgage Company, which amount was equal to the insured mortgage.

12. Had HUD known the true costs of construction for Lurline Gardens, HUD would have endorsed for insurance a mortgage in the amount of only $3,007,000. or 90% of the actual cost of construction, the amount the Partnership was entitled to receive under the National Housing Act. The Partnership, therefore, received $227,700. in excess of that permitted by the National Housing Act.

13. Plaintiff has demanded, pursuant to the terms of the Agreement and Certification, that defendants pay the excess of the mortgage proceeds to the mortgagee of Lurline Gardens in order to reduce the mortgage, but defendants have refused to do so.

14. In the Firm Commitment, HUD also agreed to make interest reduction payments on behalf of the Partnership to the mortgagee of Lurline Gardens.

15. At the time defendants submitted the certifications of cost to HUD, Ehrlich knew that HUD would be making monthly interest reduction payments on behalf of the Partnership to the mortgagee of Lurline Gardens and that the amount of such payments is determined by the amount of the mortgage.

16. Since July 18, 1972, the mortgagees of Lurline Gardens have presented to HUD for payment seventy-six vouchers for interest reduction payments on behalf of the Partnership.[1/]

17. Based on the current mortgage amount of $3,235,000, HUD has from July 18, 1972 to December 1, 1978, paid to the mortgagees of Lurline Gardens $995,264.22 based on these vouchers.

18. Had HUD endorsed a mortgage in the amount of $3,007,000, HUD would have paid the mortgagees only $925,195.50 in interest reduction payments on behalf of Lurline Gardens, or $70,068.72 less than the amount paid.

19. HUD receives one voucher for an interest reduction payment each month from the current mortgagees of Lurline Gardens.

20. HUD has a continuing obligation, for the forty-year life of the mortgage, to make monthly interest

---

[1/] During oral argument, the Court stated the number of forfeitures to which plaintiff is entitled to be 72. From a review of the record, it is apparent that the correct number should be 76. See, e.g., Affidavit of Alton Thompson, para. 4; Defendants' Memorandum in Opposition to Plaintiff's Motion, p. 22, lines 1-5.

reduction payments to the mortgagee of Lurline Gardens.

21. The current mortgagee of Lurline Gardens is the Federal National Mortgage Association (FNMA).

CONCLUSIONS OF LAW

There is no issue of material fact contained in either of the two Counts of the complaint herein and plaintiff is entitled to judgment as a matter of law on both counts.

COUNT 1 Defendants Lurline Gardens Limited Dividend Housing Partnership and Richard Ehrlich, as general partner, have a contractual obligation to plaintiff, United States, to pay to the mortgagee of Lurline Gardens the excess amount the Partnership received in violation of the National Housing Act, which amount is $227,700. Plaintiff has made demand upon defendants pursuant to the terms of the contract. Defendants have failed to meet that demand and have thereby breached the contract. Plaintiff is without an adequate remedy at law, since plaintiff is under a continuing obligation to make interest reduction payments to the mortgagee of Lurline Gardens based on the amount of the existing

mortgage. Plaintiff is, therefore, entitled to specific performance of the contract. Plaintiff is entitled to have defendants pay to FNMA, the current mortgagee of Lurline Gardens, $227,700. to reduce the outstanding mortgage and thereby reduce the amount of future interest reduction payments.

COUNT II Defendants have knowingly and intentionally caused the submission of false claims to the Government by submitting to HUD false statements, namely the Contractor's Certificate of Cost and the Mortgagor's Certificate of Cost. In reliance upon these certifications which were fraudulently inflated, HUD was induced to endorse the Lurline Gardens mortgage for insurance in an excessive amount and to make interest reduction payments based on that mortgage in an excessive amount. Each month the mortgagee of Lurline Gardens submits a voucher to HUD for an interest reduction payment. Each of these vouchers is a false claim within the meaning of the False Claims Act, supra, since each is based on the false statements contained in the cost certifications and each is a claim for money upon the Government. Plaintiff is entitled to recover

$140,137.44 which is double the amount of damages plaintiff has incurred as a result of excess interest reduction payments, and $152,000.00 representing a $2,000 forfeiture for each of the seventy-six false claims made upon the Government in the form of vouchers for interest reduction payments.

Dated: January 16, 1979

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The False Claims Act, 31 U.S.C. §231 has not been enacted into positive law. Revised Statutes, §§ 3490 and 5438 provide the text currently in force:

Revised Statutes §3490 provides, in pertinent part:

> Any person . . . who shall do or commit any of the acts prohibited . . . shall forfeit and pay to the United States the sum of $2,000.00, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act . . . .

Revised Statutes §5438 provides, in pertinent part:

> Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to . . . the United States, any claim on or against the Government . . . knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or

entry . . . .

31 U.S.C. §233 provides, in pertinent part:

It shall be the duty of the several United States attorneys . . . to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit . . . and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages . . .

National Housing Act, 12 U.S.C. §1715l:

(a) This section is designed to assist private industry in providing housing for low and moderate income families and displaced families.

* * * *

(d) To be eligible for insurance under this section, a mortgage shall —

* * * *

(3)

* * * *

(iii) not exceed (1) in the case of new construction, the amount which the Secretary estimates will be the replacement cost of the property or project when the proposed improvements are completed (the replacement cost

may include the land, the proposed physical improvements, utilities within the boundaries of the land, architect's fees, taxes, interest during construction, and other miscellaneous charges incident to construction and approved by the Secretary), * * * * Provided further, that in the case of any mortgagor other than a non-profit corporation or association, cooperative (including an investor-sponsor), or public body, or a mortgagor meeting the special requirements of subsection (e)(1) of this section, the amount of the mortgage shall not exceed 90 per centum of the amount otherwise authorized under this section . . .

National Housing Act, 12 U.S.C. §1715r provides, in pertinent part:

> [N]o mortgage covering new construction . . . shall be insured . . . unless the mortgagor has agreed (a) to certify, upon completion of the physical improvements on the mortgaged property or project and prior to final endorsement of the mortgage, either (i) that the approved percentage of actual cost . . . equaled or exceeded the proceeds of the mortgage loan or (ii) the amount by which the proceeds of the mortgage loan exceeded such approved percent-

age of actual cost, as the case may be, and (b) to pay forthwith to the mortgagee, for application to the reduction of the principal obligation of such mortgage, the amount, if any, certified to be in excess of such approved percentage of actual cost. * * * *

(b) The term "approved percentage" means the percentage figure which . . . the Secretary is authorized to apply to his estimate of value, cost, or replacement cost, as the case may be, of the property or project in determining the actual insurable mortgage amount * * * *

(c) The term "actual cost" has the following meaning: (i) in case the mortgage is to assist the financing of new construction, the term means the actual cost to the mortgagor of such construction, including amounts paid for labor, materials, construction contracts, off-site public utilities, streets, organizational and legal expenses, such allocations of general overhead items as are acceptable to the Secretary, and other times of expense approved by the Secretary, plus (1) a reasonable allowance for builder's profit . . . and (2) an amount equal to the Secretary's estimate of the fair market value of any land . . . but excluding the amount of any kickbacks, rebates or trade discounts received in connection with the construction of the improvements . . . .

National Housing Act §236, 12 U.S.C. §1715z-1:

(a) For the purpose of reducing rentals for lower income families, the Secretary is authorized to make, and to contract to make, periodic interest reduction payments on behalf of the owner of a rental housing project designed for occupancy by lower income families, which shall be accomplished through payments to mortgagees holding mortgages meeting the special requirements specified in this section.

* * * *

(c) The interest reduction payments to a mortgagee by the Secretary on behalf of a project owner shall be in an amount not exceeding the difference between the monthly payment for principal, interest, and mortgage insurance premium which the project owner as a mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest such project owner would be obligated to pay if the mortgage were to bear interest at the rate of 1 per centum per annum.

* * * *

(g) The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a

reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section.

Federal Rules of Civil Procedure, Rule 56 provides:

* * * *

(c) . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * *

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or

served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be take or discovery to be had or may make such other order as is just.

Housing and Urban Development Regulations, 24 C.F.R. §236.510(a)(2) provides:

(a) The term for which interest reduction payments shall be made shall begin on the following dates:

* * * *

(2) With respect to a mortgage insured upon completion, the date on which the Commissioner endorses the mortgage note for issuance.

Housing and Urban Development Regulations, 24 C.F.R. §236.510(b)(2) provides in pertinent part:

(b) The term of the interest reduction payment shall end upon the occurrence of one of the following events:

* * * *

(2) The Commissioner's receipt of the mortgagee's notice of intention to file an insurance claim and to acquire and convey title . . .

CERTIFICATE OF SERVICE

I, the undersigned, certify as follows:

I am a member of the bar of this Court.

On July , 1981, I served the foregoing Petition for Writ of Certiorari on the respondents in this proceeding by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed to the attorneys of record for said respondents, as follows:

William S. Freeman
Attorney, Civil Division
Department of Justice
Ben Franklin Station
Post Office Box 261
Washington, D.C. 20044

Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

_____
LAURA GOLDIN